

Notices

Federal Register

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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648-XG11

Atlantic Coastal Fisheries Cooperative Management Act Provisions; Tautog Fishery

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Notice of determination of Non-compliance; Declaration of a moratorium.

SUMMARY: In accordance with the Atlantic Coastal Fisheries Cooperative Management Act (Atlantic Coastal Act), NMFS, upon a delegation of authority from the Secretary of Commerce (Secretary), has determined that the State of New Jersey has failed to carry out its responsibilities under the Atlantic States Marine Fisheries Commission's (Commission) Interstate Fishery Management Plan for Tautog (Plan) and that the measures New Jersey has failed to implement and enforce are necessary for the conservation of the tautog resource. This determination is consistent with the findings of the Commission on February 7, 2008. Pursuant to the Atlantic Coastal Act, a Federal moratorium on fishing for tautog within the state waters of New Jersey is hereby declared and will be effective on April 1, 2008. The moratorium will be withdrawn when New Jersey is found to have come back into compliance with the Commission's Tautog Plan.

DATES: Effective April 1, 2008.

ADDRESSES: Harold C. Mears, Director, State, Federal and Constituent Programs Office, NMFS, Northeast Region, One Blackburn Drive, Gloucester, MA 01930.

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SUPPLEMENTARY INFORMATION:

Non-Compliance Statutory Background

The Atlantic Coastal Act, 16 U.S.C. 5101 *et seq.* sets forth a non-compliance review and determination process that is triggered when the Commission finds that a state has not implemented measures specified in the Plan and refers that determination to the Secretary for review and potential concurrence. The Secretary delegated all decision-making under this process to NMFS, although NMFS is required to notify the Secretary before any final action is taken.

The Atlantic Coastal Act's non-compliance process involves two stages of decision-making. In the first stage, the Secretary (delegated to NMFS) must make two findings: 1) whether the state in question has failed to carry out its responsibility under the Commission's Interstate Fishery Management Plan; and if so 2) whether the measures that the state failed to implement and enforce are necessary for the conservation of the fishery in question. These initial findings must be made within 30 days after receipt of the Commission's non-compliance referral and consequently, this first stage of decision-making is referred to as the "30-day Determination."

A positive 30-day Determination triggers a mandatory moratorium on fishing within state waters for the fishery in question. This moratorium may begin immediately or at any time within six (6) months of the 30-day Determination.

Commission Referral of Non-Compliance

On February 7, 2008, the Commission voted the State of New Jersey out of compliance with the Commission's Tautog Plan. Specifically, the Commission found that New Jersey had not implemented management measures to achieve the required 25.6 percent reduction in tautog exploitation as was required by Addendum IV and Addendum V to the Tautog Plan. Addenda IV and V were developed in response to the best and most recently available science as set forth in the January 2006 peer reviewed tautog stock assessment. The stock assessment

indicated that stock levels were at historic lows, that the coastwide stock was overfished and that overfishing was occurring. Addendum IV mandated that states reduce their harvest by 25.6 percent and Addendum V allowed states discretion to parse Addendum IV's reductions between the different fishing sectors (i.e., commercial versus recreational).

The Commission's vote on February 7, 2008, was the culmination of months of debate between the Commission and its Scientific Technical Committee (TC) on the one hand and the State of New Jersey and the New Jersey Marine Fisheries Council (NJ Council) on the other. Throughout this process, New Jersey argued that it has already taken measures - outside of addenda IV and V - that have substantially reduced mortality in the state's tautog population and that no additional restrictions on harvest are necessary to meet the Plan's fishing mortality targets. To support this position, New Jersey submitted a numerous state-specific proposals to the Commission including a proposal based upon a Virtual Population Assessment (VPA), as well as proposals based upon a Trawl Based Assessment Method (TBAM).

New Jersey admitted that its state VPA model was of much lower precision than the Commission's coastwide VPA model and not suitable as a stand alone analysis. The TC concurred and rejected the state VPA. Similarly, the TC was unable to support New Jersey's TBAM analysis due to the lack of comparable metrics between the state's methodology and the Commission's coastwide analysis. The TC also expressed concerns over certain assumptions contained in the TBAM analysis, and, as a result, could not approve New Jersey's proposal. The NJ Council nevertheless remained committed to the TBAM analysis, which justified taking no further harvest restrictions, and the Council blocked state efforts to implement complying tautog regulations. The Council informed the Commission of their veto of the States' complying tautog regulations in a letter dated November 7, 2007. This position formed the basis of the Commission's vote on February 7, 2008 to find the State of New Jersey out of compliance.

Agency Action In Response to Commission Non-Compliance Referral

The Commission forwarded the findings of their vote on February 7, 2008, in a formal non-compliance referral letter that the Secretary received on February 11, 2008. In response, NMFS began the Atlantic Coastal Act's 30-day determination clock. Immediately thereafter, NMFS sent letters to the State of New Jersey, the Mid-Atlantic and New England Fishery Management Councils and to the Commission, advising them of the Atlantic Coastal Act's non-compliance process, inviting them to provide commentary on the issue, and in the case of New Jersey, inviting the State to meet with NMFS to present its position in person or provide written comments on the Commission's findings.

Although New Jersey declined the invitation to meet, they did provide written comments to NMFS on February 28, 2008. New Jersey's February 28, 2008 letter simply restated the arguments that New Jersey had made in support of the TBAM method before the TC and Commission. The letter presented no new facts, nor propounded any new arguments. The Mid-Atlantic Fishery Management Council commented on February 27, 2008 in support of the Commission's non-compliance determination, but provided no new information in support of their conclusion. The Commission also responded on February 27, 2008 indicating that it had no further comments to add. No comments have yet been received from the New England Fisheries Management Council.

Agency's Findings

New Jersey did not fulfill its responsibilities under the Commission's Tautog Plan. New Jersey does not dispute that it has not implemented additional measures pursuant to Addendum IV and Addendum V. The addenda require states to reduce fishing mortality for tautog by 25.6 percent. In 2007, New Jersey, along with all other states on the Commission's Tautog Management Board, voted to adopt the addenda as a mandatory part of the Tautog Plan. New Jersey, also voted to approve the findings of the 2006 tautog stock assessment upon which the Addenda were based. Specifically, the 2006 stock assessment concluded that existing Tautog Plan management measures were not enough to save the tautog resource; that still more reduction measures (Addenda IV and V) were necessary. Thus, New Jersey is in the position of agreeing with the scientific call for action (the 2006 stock

assessment), agreeing with the proposed action itself (Addenda IV and V's 25.6 percent reduction), yet a few months later, the State advances the argument that, all along, it need do nothing more under the Tautog Plan than was required of the State under the pre-existing Tautog Plan.

New Jersey used state-specific assessments to argue that it need do nothing under Addendum IV to meet the Plan's mortality targets. Addendum IV allows New Jersey to make such an attempt, but places the burden on the state to establish that its methodology is "at the same level of precision as the most recent [2006 tautog stock] assessment." New Jersey failed to meet this burden. The scientists of the TC reviewed New Jersey's proposals, but could approve none as being sufficiently precise. NMFS agrees with the TC's findings and further notes that the most recent landings data - data that was unavailable to the TC and not present in New Jersey's proposals shows a three fold increase in New Jersey recreational landings in 2006 over the prior years harvest. Accordingly, even if, for argument's sake, the TC's analysis was overly cautious at the time, New Jersey's substantial increase in tautog harvest in 2006 seems to underscore the applicability of Addendum IV, or at the very least, justifies the lack of confidence in the State's proposals and the need for additional constraints on harvest in New Jersey.

Absent an acceptable submission by the state, New Jersey is required to comply with measures under Addenda IV and V. It has not, and has thus not fulfilled its responsibilities under the Tautog Plan. NMFS determined the measures that New Jersey failed to implement are necessary for the conservation of the fishery. The conservation basis of Addenda IV and V is straight-forward and obvious. The following facts are accepted by New Jersey and disputed by nobody:

1. According to the 2006 peer-reviewed stock assessment, the tautog resource continues to be at very low biomass levels.
2. Since the mid-1980s, tautog has undergone a substantial decrease in total and spawning stock biomass, with both currently at levels about one-third of their historical averages.
3. Tautog is currently listed both as overfished and with overfishing occurring. The most recent landings data suggests that New Jersey's recreational landings more than tripled in 2006.
4. Addendum IV and Addendum V directly respond to this conservation need and the addenda were voted upon

and unanimously approved by all states including New Jersey in 2007.

New Jersey Council erroneously contends that it has already met the required reductions through measures it implemented under the pre-existing Tautog Plan. First, the 2006 stock assessment took account of the earlier Tautog Plan reductions for which New Jersey would like to claim credit. In other words, Addendum IV=s measures incorporated these earlier reductions and new, lower targets were still deemed necessary in order to rebuild the tautog resource. New Jersey, thus, has yet to contribute to any of the reductions deemed necessary under Addenda IV and V to conserve the resource.

Second, New Jersey's harvest as a percentage of the coastwide total harvest is significant. New Jersey landings by recreational and commercial harvesters frequently place New Jersey among the top harvesters of tautog. New Jersey's recreational harvest as a percentage of the coastwide total rose by more than 300 percent from 2005 to 2006, ballooning from 5 percent to 17 percent, respectively. Commercial landings have remained between 15 and 23 percent of the 2003-2006 coastwide harvest. These numbers represent a significant contribution by New Jersey to the overall coastwide fishing mortality for tautog. Accordingly, its failure to implement conservation measures under Addenda IV and V will most certainly jeopardize any rebuilding efforts.

A Moratorium Shall be Implemented on April 1, 2008

Pursuant to the Atlantic Coastal Act, NMFS must implement a moratorium within 180 days of the positive 30-day Determination that is being made in this matter. NMFS has determined that an April 1, 2008, closure would both benefit tautog conservation and allow for the necessary logistics that accompany such a closure.

The April 1, 2008, date provides more conservation than dates towards the end of the six month moratorium window, which would not conserve tautog when they congregate to spawn in late spring/early summer. Nor would these later potential closure dates capture the potential spike in tautog landings that occurred in the spring according to the most recent NMFS Marine Recreational Fisheries Statistical Survey data. An immediate closure i.e., on the first date after the positive 30-day Determination, (March 12, 2008) would likely provide the most conservation, although not significantly more, but the short time frame would make the closure difficult

to implement as a matter of logistics and notice. Closure dates to the end of the six month moratorium window provide ample time for logistics and notice, more time than is necessary. In sum, an April 1, 2008, closure date would on balance maximize conservation while allowing sufficient time for the notice and logistics necessary to implement such closure.

Moratorium Prohibitions

Once the moratorium takes effect, the moratoriums' proscribed conduct shall reflect the prohibited acts mandated by the Atlantic Coastal Act as set forth as 16 U.S.C. 5106(e). Accordingly, as of Tuesday, April 1, 2008, it shall be unlawful any person or vessel to do the following:

1. Engage in fishing for tautog (*Tautogis onitis*)—also commonly known as "blackfish" within New Jersey waters—0 to 3 nautical miles (0 to 5.5 kilometers) from shore;
2. Land, attempt to land, or possess tautog that are caught, taken, or harvested in New Jersey state waters—waters 0 to 3 nautical miles (0 to 5.5 kilometers) from shore;
3. Fail to return to the water immediately, with a minimum of injury, any tautog that are taken incidental to fishing for species (i.e., as bycatch) other than tautog;
4. Refuse to permit any officer authorized to enforce the provisions of this moratorium to board a fishing vessel subject to such person's control for purposes of conducting any search or inspection in connection with the enforcement of this moratorium;
5. Forcibly assault, resist, oppose, impede, intimidate, or interfere with any such authorized officer in the conduct of any search or inspection under this moratorium;
6. Resist a lawful arrest for any act prohibited by this moratorium;
7. Ship, transport, offer for sale, sell, purchase, import, or have custody, control, or possession of, any tautog taken or retained in violation of this moratorium; or
8. Interfere with, delay, or prevent, by any means, the apprehension or arrest of

another person, knowing that such other person has committed any act prohibited by this moratorium.

Classification

This declaration of a moratorium is consistent with the Atlantic Coastal Act at 16 U.S.C. 5106 insofar as New Jersey has been found to have failed to carry out its responsibilities under the Commission Tautog Plan and the measures that New Jersey has failed to implement and enforce are necessary for the conservation of the tautog fishery. Further, the moratorium prohibits fishing for tautog within New Jersey state waters and is being implemented within six (6) months of the agency findings.

The declaration of moratorium is consistent with the Administrative Procedures Act at 5 U.S.C. 555 insofar as New Jersey was promptly notified of the Commission's non-compliance referral and given an opportunity to meet with the agency and provide comments on the matter. New Jersey has also been promptly notified of the agency's determination in this matter. The Assistant Administrator for Fisheries, NOAA (AA), finds that providing prior public notice and opportunity for comment is impracticable and unnecessary. Providing prior notice and opportunity for comment would be impracticable, because it would prevent the agency from executing its functions under the Act in a timely manner. The Act contemplates quick action on the declaration of a moratorium that would not be possible if prior notice and an opportunity for comment are provided. Furthermore, providing prior notice and opportunity for comment would be unnecessary because it would serve no purpose. The nature of a moratorium is described in the Act and, therefore, cannot be modified in response to public comments.

The declaration of moratorium does not trigger the analytical requirements of the Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.* because prior notice and opportunity for public comment are not required for this determination by

the Administrative Procedures Act or any other law.

The declaration of a moratorium does not fall under review under Executive Order 12866 insofar as the moratorium is not a regulatory action of the agency but is an action mandated by Congress upon the findings of certain conditions precedent set forth in the Atlantic Coastal Act, which also prescribes the nature and extent of the moratorium. The fishery is smaller relative to other Commission fisheries and a moratorium is not expected to materially adversely affect the economy or have an impact of over \$100 million. The matter creates no serious inconsistency with actions by other agencies and it is not expected to have material budgetary impacts. The declaration of moratorium is not significant within the meaning of the Executive Order.

The declaration of moratorium is not the result of a policy formulated or implemented by the agency, but is instead the result of the application of found facts to the Congressional standards set forth in the Atlantic Coastal Act and as such, the declaration does not implicate federalism in the manner contemplated by Executive Order 13132. Further, the agency has consulted with New Jersey to the maximum extent practicable in this matter given the truncated timeframe set forth in the Atlantic Coastal Act. Rather, the Act provides clear evidence that Congress intended the Secretary to have the authority to preempt state law. That authority has been delegated from the Secretary to NMFS. The scope of the moratorium reflects the standards set forth in the Atlantic Coastal Act, and as such restricts state law to the minimum level necessary to further the objectives of the statute.

Authority: 16 U.S.C. 5101 *et seq.*

Dated: March 10, 2008.

James W. Balsiger,
Acting Assistant Administrator for Fisheries,
National Marine Fisheries Service.

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